No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave to Intervene

REPLY BRIEF FOR THE CITY OF CHARLOTTE, NORTH CAROLINA

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INTRODUCTION

Both Carolinas have responded to Charlotte's motion to intervene. South Carolina opposes Charlotte's intervention but does not dispute that Charlotte has a strong interest in this litigation. North Carolina does not oppose Charlotte's motion and affirmatively agrees with Charlotte's assessment of the magnitude of her interest in the litigation. *See* N.C. Brief at 1 ("Charlotte clearly has a significant interest in the outcome of this case."); *id.* ("Charlotte certainly has a strong interest").

There is no dispute that Charlotte, by virtue of its Inter-Basin Transfer (IBT) Certificate, is the entity vested with the legal authority to carry out the large majority of the IBTs that South Carolina objects to and seeks to curtail in this action. Nor is there any dispute that Charlotte is one of the principal stakeholders in the Comprehensive Relicensing Agreement—the carefully negotiated contract regarding the relicensing of Duke Energy's hydroelectric power facilities. Finally, there is no dispute that the City of Charlotte, which serves a population of more than 800,000 persons, is by far the largest municipality and largest provider of water supply and wastewater treatment services in the Catawba River Basin. Given Charlotte's significant, undisputed interests, her motion to intervene should be granted.

ARGUMENT

I. THERE IS NO RULE BARRING CHARLOTTE'S INTERVENTION IN THIS ORIGINAL ACTION.

South Carolina makes much of the fact that Charlotte "has not cited a single equitable apportionment action in which a municipality or private party has

been permitted to intervene." S.C. Opp. at 7. *See also id.* at 2 ("This Court appears never to have permitted a private person or non-sovereign entity * * * to intervene in an original equitable apportionment action."). South Carolina's suggestion that there is an unstated rule barring intervention—except by sovereign entities—in equitable apportionment cases is fanciful. This Court has never articulated such a rule. Nor has it ever suggested the principles guiding intervention operate differently in equitable apportionment cases than in other original jurisdiction cases.

The Court has permitted intervention in equitable apportionment cases. *See Arizona* v. *California*, 460 U.S. 605, 613-615 (1983). It has permitted a city to intervene in an original action. *See Texas* v. *Louisiana*, 426 U.S. 465, 466 (1976). And it has permitted a large city to be a party in an equitable apportionment case. *See New Jersey* v. *New York*, 283 U.S. 336 (1931). Thus, no principled basis exists for extracting from the Court's cases an unstated rule that a municipality cannot intervene in an equitable apportionment case. [1]

South Carolina does not even abide by its own proposed distinction between equitable apportionment cases and other original actions. In opposing Charlotte's motion, South Carolina relies on original

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[1] South Carolina claims that *New Jersey* v. *New York*, 345 U.S. 369 (1953) (*per curiam*), holds "that municipalities may not intervene in equitable apportionment actions." S.C. Opp. at 1. The opinion contains no such holding. And the subsequent case of *Texas* v. *Louisiana*, 426 U.S. 465 (1976), confirms that there is no *per se* rule against intervention by cities in original actions.

jurisdiction cases outside of the equitable apportionment context. *See, e.g.*, S.C. Opp. at 5 (asserting that *Kentucky* v. *Indiana*, 281 U.S. 163 (1930), which is not an equitable apportionment case, "provides especially pertinent guidance here").

II. CHARLOTTE SHOULD BE ALLOWED TO INTERVENE EVEN THOUGH NORTH CAROLINA IS A PARTY.

South Carolina's opposition to Charlotte's intervention is based primarily on this Court's denial of Philadelphia's two-decades late motion to intervene in *New Jersey* v. *New York*, 345 U.S. 369 (1953) (*per curiam*) (*New York*), but that case actually supports Charlotte's intervention.

Philadelphia argued that she should be allowed to intervene because New York City was already present in the case as a party. *See id.* at 374. Rejecting the argument, this Court explained that New York City was a proper party in the case because, unlike Philadelphia, New York City "was the authorized agent for the execution of the sovereign policy which threatened injury to the citizens of New Jersey." *Id.* at 375. Here, Charlotte stands in the shoes of New York City, not Philadelphia. Charlotte is the governmental entity authorized to execute the bulk of the certificated IBTs that South Carolina claims are injurious. *See also Missouri* v. *Illinois*, 180 U.S. 208, 242 (1901) (Chicago Sanitary District was proper party defendant in original action because it was "an agency of the state to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended").

Charlotte also differs from Philadelphia in that Pennsylvania *opposed* Philadelphia's proposed

intervention. *See New York*, 345 U.S. at 372 ("All of the present parties to the litigation have formally opposed the motion to intervene * * *."). In contrast, North Carolina has not opposed Charlotte's motion. *See* N.C. Brief at 3 ("North Carolina takes no position with respect to Charlotte's Motion to Intervene"). The opposition of Philadelphia's home State (not to mention every other party) to Philadelphia's motion was surely a significant factor in the Court's decision to deny intervention. *See New York*, 345 U.S. at 373 (observing that the principle of *parens patriae* "is a necessary recognition of sovereign dignity").

In addition, South Carolina makes no mention of the fact that Philadelphia's motion to intervene was untimely—by at least 20 years. The *New York* case was commenced by New Jersey in 1929. Pennsylvania successfully intervened in 1930. Philadelphia did not move to intervene until 1952. *See* Charlotte Motion at 15-16. Here, South Carolina does not contend that Charlotte's motion to intervene is untimely. *See id.* at 20-21 (explaining why Charlotte's motion is timely).

South Carolina also relies on *Kentucky* v. *Indiana*, 281 U.S. 163 (1930), but that reliance is misplaced. Kentucky there filed a bill of complaint against Indiana to enforce a contract between the two States. Kentucky also named as defendants nine individual Indiana citizens and taxpayers who had filed a lawsuit in Indiana state court to enjoin the contract. This Court dismissed the bill as against the nine individual defendants, explaining that

> *there is no showing that the individual defendants have any interest whatever* with respect to the

> contract and its performance *other than that of the citizens and taxpayers, generally*, of Indiana, an interest which that state in this suit fully represents. [*Id.* at 174 (emphases added).]

Here, it cannot be said that Charlotte's interest is merely the general interest of a North Carolina citizen or taxpayer. *See* Charlotte Motion at 2-10; Introduction, *supra*.

South Carolina leans heavily upon the *New York* Court's statement that "[a]n intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U.S. at 373. [2]

Charlotte clearly has a "compelling interest in [her] own right" in this litigation—a compelling interest that is above and beyond the interest of "all other citizens and creatures of the state." Indeed, the magnitude of Charlotte's interest in withdrawals from the Catawba River is greater than that of all other municipal water supply providers in North Carolina combined. *See* Charlotte Motion at 2-10; Introduction, *supra*. Furthermore, Charlotte's interest is not a duplicate of North Carolina's interest. [3]

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[2] South Carolina asserts that Charlotte's interests are "conclusively" represented by North Carolina. S.C. Opp. at 1, 2, but this Court has set no such standard. Rather, it has described the legal principle at issue as a "general rule" and a "presum[ption]." *Nebraska* v. *Wyoming*, 515 U.S. 1, 21 (1995).

[3] This Court has indicated, in the intervention context, that the concept of adequacy of representation by existing parties

First, courts have recognized (even if North Carolina does not [4]) that a governmental entity charged with representing all users along a river has an interest different from the interest of a downstream user. *See South Dakota* v. *Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003), *cert. denied*, 541 U.S. 987 (2004); *Alabama* v. *U.S. Army Corps of Eng'rs*, 229 F.R.D. 669, 675 (N.D. Ala. 2005). Within North Carolina, the City of Charlotte, which sits on the border between the Carolinas, is a downstream user of the Catawba River. Thus, her interest is narrower than North Carolina's. South Carolina points out the obvious (*see* S.C. Opp. at 4 n.2)—that *South Dakota* and *Alabama* were not original actions—but those courts' observations regarding the different interest of a downstream user versus a government entity responsible for representing all users remain on point here.

Second, Charlotte differs from North Carolina in that Charlotte has no duties under Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341. North Carolina and South Carolina have misconstrued Charlotte's argument that North Carolina's Section

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should be regarded as a "minimal" burden. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (applying Fed. R. Civ. P. 24). This Court uses the Federal Rules of Civil Procedure, including Rule 24, as "guides" in original actions. S. Ct. R. 17.2. *See, e.g.*, *Arizona* v. *California*, 460 U.S. at 614-615 (permitting Indian tribes to intervene in original action and stating that "the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules").

[4] North Carolina agrees that it "represents all of the users of water in" the State, but does not agree that it "will not represent the interests of Charlotte in this litigation." N.C. Br. at 2.

401 duties prevent it from adequately representing Charlotte's interest in protecting those water withdrawals and IBTs called for in the Comprehensive Relicensing Agreement (CRA). North Carolina argues that its CWA duties do not prevent it from "securing the full range of benefits accruing to the State of North Carolina under the CRA." N.C. Brief at 2. Charlotte does not disagree as to North Carolina's defense of *the State's* benefits, but rather that the State could not defend, without reservation, the benefits *Charlotte* bargained for in the CRA. South Carolina makes the nonsensical (and offensive) argument that Charlotte seeks intervention to protect its interest in violating the law. *See* S.C. Opp. at 10.

Pursuant to CWA Section 401, North Carolina has the authority to decide whether Duke's license, issued by the Federal Energy Regulatory Commission ("FERC") pursuant to the Federal Power Act, will comply with the State's water quality standards. *See* 33 U.S.C. § 1341(a)(1). In its certification of compliance for Duke's license, North Carolina must include "any effluent limitations or other limitations * * * necessary to assure that * * * [Duke] will comply with any * * * appropriate requirement of State law * * *." *Id.* § 1341(d). Of particular importance, such limitations may include conditions dictating how Duke operates its dams on the Catawba River, including any stream flow requirements that the State deems necessary to protect designated uses of the River or to comply with the State's water quality criteria. *PUD No. 1 of Jefferson County* v. *Washington Dep't of Ecology*, 511 U.S. 700, 711-723 (1994). Any required flows imposed by North Carolina

might, or might not, be consistent with the flows specified in the CRA.

As Charlotte has explained, the CRA specifies river flows and reservoir elevations that will accommodate Charlotte's water withdrawals and IBTs for the next 50 years. *See* Charlotte Motion at 3, 9. Those parameters establish the conditions under which Duke will operate its projects *unless* North Carolina changes those parameters pursuant to its Section 401 authority. Because North Carolina retains the authority under Section 401 to change the River flows that Duke must provide, it therefore has authority to affect the other parameters of the CRA that are interdependent with those flows, including Charlotte's water *withdrawals and IBTs* that otherwise would be assured under the CRA.

Accordingly, the CRA provides that "the State of North Carolina * * * do[es] not assent to any fact, opinion, approach, methodology, or principle, expressly identified or otherwise implied in this Agreement." CRA § 19.3. North Carolina's official position, as reflected in the CRA itself, is that, until it exercises its Section 401 authority, the State does not and cannot "assent to" the specific withdrawals and IBTs to which Charlotte would be entitled pursuant to that Agreement. North Carolina's litigating position, as expressed in its Response to Charlotte's Motion, cannot change that fact.

This conclusion is neither academic nor trivial. South Carolina claims that Charlotte's planned withdrawals and IBTs, even though provided for in the CRA, are "unlawful." *See* S.C. Complaint ¶¶ 20-24; S.C. Brief in Support of Motion for Leave to File

Complaint at 1.[5] South Carolina therefore seeks a decree from this Court that enjoins implementation of Charlotte's IBT. *See* S.C. Complaint, Prayer for Relief. Acting in its capacity as *parens patriae*, South Carolina thereby repudiates the CRA on behalf of over two dozen signatories from that State.[6] In response, North Carolina argues that Charlotte's IBTs are too small to harm South Carolina, and that this Court should wait to see whether FERC resolves South Carolina's issues and concerns by adopting the CRA, but North Carolina does not explain the extraordinary importance and value of CRA-recognized withdrawals and IBTs that Charlotte provides to hundreds of thousands of users in the largest metropolitan area in the Carolinas. *See* N.C. Opp. to S.C. Motion for Leave at 16.

Charlotte seeks intervention to do much more. If South Carolina can provide clear and convincing evidence that the Charlotte-dominated withdrawals and IBTs in North Carolina are causing injury of a serious magnitude to South Carolina's interests, the principles of equitable apportionment will take

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[5] While South Carolina highlights Charlotte's IBT of 43 million gallons per day (MGD), as well as the 10 MGD IBT granted to Concord/Kannapolis that Charlotte may be called upon to implement, it also complains about Union County's grandfathered IBT of 5 MGD. *See* S.C. Complaint ¶ 21.

[6] Two parties to the CRA, Lancaster County Water and Sewer District and Union County, also are participants in the Catawba River Water Supply Project ("CRWSP"). Those parties, through the CRWSP, are seeking to intervene as a defendant in this action and free themselves from the conflicting representation that South Carolina seeks to force upon the CRWSP and its participants—representation that is contrary to their commitments under the CRA.

center stage. Charlotte intends to fully support all pertinent flows, water uses and other aspects of the CRA by presenting, in detail, analyses of its present and future water needs and conservation programs, as well as the economic and societal value of water uses in its service area. In other words, Charlotte wishes to fully support the withdrawals and IBTs set forth in the CRA, which are the critical elements of that Agreement that South Carolina is attacking and North Carolina cannot "assent to" unless and until it completes its obligations under CWA Section 401.

Finally, *Arizona* v. *California*, 460 U.S. 605 (1983), supports Charlotte's intervention notwithstanding South Carolina's adequate representation argument. There, this Court allowed certain Indian Tribes to intervene in an equitable apportionment action. The United States did not oppose the Tribes' intervention, but the plaintiff State and all four defendant States opposed intervention "on grounds that the presence of the United States insures adequate representation of the Tribes' interests." *Id.* at 614. This Court rejected the argument, reasoning that "it is obvious that the Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules." *Id.* at 614-615. Charlotte, too, surely meets any test for permissive intervention. And, as in *Arizona* v. *California*, the party said to represent Charlotte's interests—North Carolina—does not oppose intervention, while the lone party opposing Charlotte's intervention—South Carolina—"ha[s] failed to present any persuasive reason why [its] interests would be prejudiced or this litigation unduly delayed by [Charlotte's] presence." *Id.* at 615.

III. PERMITTING CHARLOTTE TO INTERVENE WILL NOT LEAD TO A FLOOD OF INTERVENTION MOTIONS.

South Carolina asserts that if Charlotte's motion to intervene were granted, "then it would seem inevitable that many more such motions will follow." S.C. Br. in Opp. at 6. There is no reason to believe that "many more" Charlottes are waiting in wings. Charlotte is the largest city on the Catawba River, and it possesses the largest IBT Certificate. No other municipality in either Carolina can lay a claim to intervention equal to Charlotte's. No other city on the Catawba "could show comparable * * * magnitude of interest." *New York*, 345 U.S. at 376 (Jackson, J., dissenting). As a practical matter, participating as a party in this original action will require a significant commitment of resources, a commitment that Charlotte, given its keen interest in the matter at hand, is willing to make. It is far-fetched to think that "many more" municipalities will be willing to make similar expenditures.

South Carolina argued in December 2007 that the Catawba River Water Supply Project's motion to intervene would "open up the floodgates for numerous others to argue for intervention." S.C. Opp. to CRWSP Motion to Intervene at 7. Since then only one additional party—Charlotte—has moved to intervene. South Carolina's "floodgates" argument did not hold water then, and it does not hold water now. A grand total of three parties have moved to intervene in this case. Each has a substantial interest in the matter. Even if all of the pending motions to intervene were granted, this case would hardly possess "the dimensions of ordinary class actions." *New York*, 345 U.S. at 373.

IV. CHARLOTTE SHOULD BE ALLOWED TO PARTICIPATE AS A PARTY, NOT MERELY AN *AMICUS CURIAE*.

Finally, South Carolina suggests that Charlotte's motion should be denied because, in lieu of party status, Charlotte may file an *amicus* brief "as to any appropriate dispositive motion." S.C. Opp. at 11. Whether South Carolina is entitled to a decree equitably apportioning the Catawba River, and the content of any such decree, will turn on the factual record developed in this case. To participate fully in the development of that record, and to protect its substantial interests, Charlotte will require party, not *amicus*, status. Lobbing in the occasional *amicus* brief in reaction to "appropriate dispositive motion[s]" will not suffice. Under the circumstances, "the right to file a brief as *amicus curiae* is no substitute for the right to intervene as a party in the action." *Coalition of Arizona/New Mexico Counties for Stable Econ. Growth* v. *Dep't of the Interior*, 100 F.3d 837, 844 (10th Cir. 1996).

CONCLUSION

South Carolina asserts that "[t]his is a dispute between two States." S.C. Opp. at 1. But the two Carolinas are not the only ones with a dog in this fight. South Carolina's lawsuit threatens the water supply on which more than 800,000 people in Charlotte and its service area depend as well as all of the hard work that went into the Comprehensive Relicensing Agreement. In addition to the two States, others have significant interests in this litigation and deserve to be heard as parties. The City of Charlotte is one of them.

For the foregoing reasons, as well as those stated in Charlotte's motion for leave to intervene, Charlotte's motion should be referred to the Special Master and should be granted.

Respectfully submitted,

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